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No. ....

IN THE

Supreme Court of the United States

October Term, 1982

THURSTON MOTOR LINES, INC.,

Petitioner,

vs.

JORDAN K. RAND, LTD.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Question Presented.

Whether a lawsuit brought by a regulated motor common carrier operating in interstate commerce to recover freight charges from a customer of the carrier is within the jurisdiction of a district court as arising "under any Act of Congress regulating commerce" as provided in 28 U.S.C. §1337.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Statement of Jurisdictional Grounds	2
Statutes Involved	2
Statement of the Case	2
Argument	4
The Judgment of the Ninth Circuit Is in Conflict With Decisions of This Court, and the Third, Seventh and Tenth Circuits and With at Least One of Its Own Prior Decisions	4
Disagreement With Other Circuits	6
Conclusion	10

INDEX TO APPENDICES

Appendix A. Opinion of the United States Court of Appeals, for the Ninth Circuit	App. p. 1
Order of Dismissal	8
Appendix B. Pertinent Statutes Involved	9
Appendix C. Complaint for Freight Charges	12

TABLE OF AUTHORITIES

Cases	Page
Bell v. Hood, 327 U.S. 678 (1946)	6
Bernstein Bros. Pipe & Mach. Co. v. Denver & R.G.W.Ry. Co., 193 F.2d 441 (10th Cir. 1951)	4, 7, 8
Garrett v. Time-D.C., Inc., 502 F.2d 627 (9th Cir. 1974), cert. den. 421 U.S. 913 (1975)	4, 8
Louisville & Nashville Railroad Co. v. Rice, 247 U.S. 201, 38 S.Ct. 429, 62 L.Ed. 1071 (1918)	4, 5, 6, 8
Madler v. Artoe, 494 F.2d 323 (7th Cir. 1974)	4, 6, 7
Phillips Petr. Co. v. Texaco, Inc., 415 U.S. 125 (1974)	5
Public Serv. Comm'n of Utah v. Wycoff Co., 344 U.S. 237 (1952)	5
Southern Pac. Co. v. Miller Abbatoir Co., 454 F.2d 357 (3d Cir. 1972)	4, 8
Southern Pacific Transportation Co. v. Commercial Metals, ___ U.S. ___, 102 S.Ct. 1815 (1982)	9
White v. Atchison, Topeka, Santa Fe Ry., 149 F.2d 919 (9th Cir. 1945)	4

Miscellaneous	
Act of October 17, 1978, Public Law 95-473, Sec. 3, 92 Stat. 1466	2

Statutes	
United States Code, Title 28, Sec. 1254(1)	2
United States Code, Title 28, Sec. 1337	i, 3, 6
United States Code, Title 28, Sec. 1337(a)	2
United States Code, Title 49, Sec. 316(b)	2, 6
United States Code, Title 49, Sec. 317(b)	2, 6
United States Code, Title 49, Sec. 10741(a)	2, 3, 6
United States Code, Title 49, Sec. 10761(a)	2, 6

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PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Court of Appeals has been officially reported at 682 F.2d 811. (A copy of the opinion is included at Appendix A, *infra*, pages 1 through 7.)

The opinion of the District Court for the Central District of California, denominated an "Order of Dismissal" and dated May 5, 1980 (filed May 6, 1980 and entered May 7, 1980) is unreported. (A copy of the Order of Dismissal is included at Appendix A, *infra*, page 8.)

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*All of the parties to this proceeding are listed in the caption of this case. Petitioner Thurston Motor Lines, Inc. has no subsidiary, parent nor affiliate.

Statement of Jurisdictional Grounds.

The judgment of the Court of Appeals for the Ninth Circuit was dated, filed and entered July 27, 1982. No petition for rehearing was filed. This Court has jurisdiction to review the judgment under 28 U.S.C. §1254(1).

Statutes Involved.

The statutes involved include the following: 28 U.S.C. §1337(a); 49 U.S.C. §317(b) (supplanted in 1978 by recodification of the Interstate Commerce Act); 49 U.S.C. §10741(a); 49 U.S.C. §10761(a); Act of October 17, 1978, P.L. 95-473, Section 3, 92 Stat. 1466. The pertinent text is set forth at Appendix B, *infra*, pp. 9-11.

Statement of the Case.

As alleged in the complaint, petitioner Thurston Motor Lines, Inc. (hereinafter "Thurston") is a common carrier by motor vehicle, authorized as such by the Interstate Commerce Commission. Thurston performed transportation services for defendant Jordan K. Rand, Ltd. (hereinafter "Rand") and Rand failed to pay for those services as required by the tariffs of Thurston on file with the ICC. The complaint also alleged that the action arose under an Act of Congress regulating commerce, namely 49 U.S.C. §10741(a).[1] (The aforementioned section is the successor to 49 U.S.C. §§316(b) and 317(b) and the recodification of the Interstate Commerce Act was deemed not to cause any changes in the substantive import of the superseded statutes. Act of October 17, 1978, P.L. 95-473, Section 3.)

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[1]The contention of the Ninth Circuit, in its opinion, that "[n]either party disputes that state law governs what must be alleged in order to recover for the alleged breach of contract" (682 F.2d at 812) is incorrect. The matter was never raised below, and petitioner has consistently proceeded in this action on the belief and basis that its right to recover for its freight charges was and is entirely a creature of *federal* law.

Lastly, Thurston alleged that the district court had original jurisdiction pursuant to 28 U.S.C. §1337. The complaint sought freight charges and interest. (A copy of the complaint is included at Appendix C, *infra*, pp. 12-13).

After the complaint was filed, and before defendant had answered, the district court on its own motion ordered Thurston to show cause why the case should not be dismissed for lack of subject matter jurisdiction in that (1) the amount sought was not sufficient for diversity jurisdiction, and (2) the statutory provision referred to in the complaint, 49 U.S.C. §10741(a), was assertedly not apposite to confer "arising under" jurisdiction over a carrier's attempt to recover its freight charges.

Thurston filed a response to the order to show cause citing cases from this Court and four Circuits, including the Ninth, which hold that a common carrier's suit for freight charges for the interstate carriage of freight is properly cognizable as "arising under" an Act of Congress regulating commerce, with jurisdiction conferred upon the district courts by 28 U.S.C. §1337.

By order dated May 5, 1980, the district court dismissed the action as follows:

> "IT IS ORDERED that this matter should be and hereby is dismissed for want of subject matter jurisdiction; *49 U.S.C. 10741(a), the statute involved, merely prevents discrimination [in trucking] charges; this statute does not provide for bill collection services by a federal court.*"[2]

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[2]The order was prepared and submitted by petitioner's counsel at the court's direction. The proposed order was subsequently amended by the court in the court's own hand, and the inserted language is italicized in the quotation above. Because the handwriting is somewhat unclear, the words "in trucking" are difficult to decipher but appear to be the words which the court intended to use. They are contextually accurate, in any event.

ARGUMENT.

The Judgment of the Ninth Circuit Is in Conflict With Decisions of This Court, and the Third, Seventh and Tenth Circuits and With at Least One of Its Own Prior Decisions.

Most simply stated, the question in this case is whether or not a lawsuit by a federally-regulated common carrier for its freight charges may be filed and prosecuted in a federal district court as an action arising under Acts of Congress regulating interstate commerce. This Court and four Courts of Appeals[3] (including the Ninth Circuit), have previously said that such a lawsuit may; the Ninth Circuit now concludes that the contrary is true. This Court should grant the writ sought in order to resolve a conflict which now exists between the opinion of the Ninth Circuit, below, and the decisions of this Court and those of the Third, Seventh and Tenth Circuits.

The Ninth Circuit's decision below conflicts with the square holding in *Louisville & Nashville Railroad Co. v. Rice*, 247 U.S. 201, 38 S.Ct. 429, 62 L.Ed. 1071 (1918), a case which the Ninth Circuit describes in its opinion as "the most troublesome precedent." 682 F.2d at 812.

The Ninth Circuit's opinion mischaracterizes *Rice* as only standing for the proposition that federal jurisdiction is available or invocable where the parties to the shipping contract agree on a carrier compensation at odds with the carrier's

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[3] *Southern Pac. Co. v. Miller Abbatoir Co.*, 454 F.2d 357 (3d Cir. 1972); *Madler v. Artoe*, 494 F.2d 323 (7th Cir. 1974); *Garrett v. Time-D.C., Inc.*, 502 F.2d 627 (9th Cir. 1974), *cert. den.* 421 U.S. 913 (1975); *Bernstein Bros. Pipe & Mach. Co. v. Denver & R.G.W.Ry. Co.*, 193 F.2d 441 (10th Cir. 1951). The Ninth Circuit in this case also characterized its prior decision in *White v. Atchison, Topeka, Santa Fe Ry.*, 149 F.2d 919, 920 (9th Cir. 1945) as "[a] second troublesome precedent" in addition to the precedent of *Rice*.

published tariffs (or have an "understanding" leading to that result). The *Rice* holding is precisely opposite to the characterization by the Ninth Circuit. The parties in *Rice* did not have the "understanding" the Ninth Circuit has created out of whole cloth (682 F.2d 812-813) nor did they disagree as to the proper amount required to be paid by the tariff. The consignee of the shipment merely attempted to avoid payment by claiming he had an equitable defense to additional, proper charges because he had paid what he thought was due, factored and sold the goods based upon the charges he had paid. The defendant did not claim an *agreement* was reached in violation of the tariff, merely that his conduct and the carrier's tardy billing gave him an estoppel defense.[4]

Notwithstanding that the *Rice* defendant *agreed* with the correctness of the carrier's charges, this Court held that the case arose under an Act of Congress regulating commerce. This Court held that the case arose under an Act of Congress regulating commerce because "as to interstate shipments there can be no question that, since the decision in the *Croninger* case [226 U.S. 291 (1913)] the parties are held to the responsibilities imposed by the federal law, to *the exclusion of all other rules of obligation*." 247 U.S. at 202. In simple words, the Interstate Commerce Act replaces and supersedes private contractual rights, remedies and defenses in respect of a carrier's charges. This Court apparently meant

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[4]Based upon the *facts* there presented, a rigorous analysis of *Rice*, under the Ninth Circuit's approach below, would find jurisdiction when the shipper raised an affirmative defense contrary to published tariffs. But jurisdiction is *not* available in such a circumstance based upon the principles enunciated in this Court s holdings in cases such as *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952); *Phillips Petr. Co. v. Texaco, Inc.*, 415 U.S. 125, 127 (1974). Thus, *Rice* cannot stand for the proposition for which the Ninth Circuit seeks to limit or distinguish it.

what it said when it observed that the duties of the carrier and its customers "grow out of and depend upon that act." 247 U.S. at 202.

Either Congress wanted the Interstate Commerce Act to supplant the rights normally associated with private contract or it did not. Unless this Court is willing to overrule *Rice* and declare that Congress meant something else, the Ninth Circuit's decision is wrong.

Disagreement With Other Circuits.

Madler v. Artoe, 494 F.2d 323 (7th Cir. 1974) is a recent case explicitly in conflict with the case below on the issue of subject matter jurisdiction. Madler, the assignee of Consolidated Freightways Corporation of Delaware, brought suit against Artoe for freight charges in the amount of $989.84. Madler alleged that the action arose under the Interstate Commerce Act, and more particularly under 49 U.S.C. §316(b) [a sister statute to §317(b), the predecessors of present 48 U.S.C. §§10741(a) and 10761(a)], and that jurisdiction was proper in the district court pursuant to 28 U.S.C. §1337. The trial court granted defendant's motion to dismiss for want of subject matter jurisdiction. The Seventh Circuit reversed, citing *Bell v. Hood*, 327 U.S. 678, 682-683 (1946), for the proposition that the district courts must entertain suits "arising under" federal law except where the claim appears to be immaterial or made solely for the purpose of obtaining federal court jurisdiction, or where the claim is wholly insubstantial and frivolous. The Seventh Circuit then went on to note that the claim in controversy, $989.84, was neither insubstantial nor frivolous. The court also noted that whether or not an action in contract could be maintained in the state court on the same facts is irrelevant to the issue of federal court jurisdiction.

The trial court in the *Madler* case made precisely the distinction that the Ninth Circuit attempts to make in this case. That is to say that the trial court concluded that existing precedent only permitted federal court jurisdiction over freight charge suits where "their adjudication required the construction of tariffs required by the Act." 494 F.2d at 324. This view was explicitly rejected by the Seventh Circuit, which also found *Rice* viable and controlling.

The most lucid of the circuit court decisions is *Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co.*, 193 F.2d 441 (10th Cir. 1951). In that case the carrier brought an action in federal court against a shipper to collect an additional $259.21 in transportation charges due on two car-loads of implements shipped from Pennsylvania to Colorado. The defendant asserted both at the trial level and on appeal that the trial court did not have jurisdiction. The Tenth Circuit disagreed and held as follows:

> "The amount of transportation charge for goods shipped in interstate commerce is not a matter of private contract between the parties. The shipper and carrier are alike bound by the established and published tariff under the provisions of [the Interstate Commerce Act]. No contract of the carrier can reduce the amount legally payable or release from liability a shipper who has assumed an obligation to pay the charges. Nor will any act or omission of the carrier estop or preclude it from enforcing payment of the full amount under the tariff by a person liable therefor. . . . The right of the carrier to collect arises out of the provisions of the Interstate Commerce Act.
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> * * *
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> "Here, since the obligation to pay and the right and duty to collect arise solely by virtue of [analogous sections] of the Interstate Commerce Act, the cause of action sought to be enforced is created by and arises

out of an Act of Congress regulating commerce." 193 F.2d at 444.

The Third Circuit in *Southern Pacific Company v. Miller Abattoir Company*, 454 F.2d 357, 362 (3rd Cir. 1972) has also held that an action for freight charges was properly cognizable as a matter "arising under" an Act of Congress regulating commerce, in reaching its ultimate holding that the carrier's claim for interest was a question of federal law because it touched and affected the total compensation to be paid. *See*, also *Garrett v. Time-D.C., Inc.*, 502 F.2d 627 (9th Cir. 1974), *cert. den.* 421 U.S. 913 (1975).

The rationale of the cases in conflict with the decision below, including *Rice* and *Bernstein* is that there is no common law contractual right abiding in a carrier to recover its charges as a mere private litigant; the carrier must recover whatever charges it can *solely* as its rights may "grow out of and depend upon" the Interstate Commerce Act. (247 U.S. at 202.) As noted above, the *Bernstein* Court, citing this Court's holding in *Rice*, correctly announced that "the amount of a transportation charge for goods shipped in interstate commerce is not a matter of private contract between the parties." (193 F.2d at 444.)

The fact that a defendant in a case such as this does not contest the correctness of the rate charged by the carrier simply does not, as supposed by the Ninth Circuit, dispose of federal jurisdiction. The carrier's right to collect and the customer's obligation to pay is a public, not private, obligation and which public obligation "arises from" the Interstate Commerce Act. Each and every charge which a carrier seeks to recover must be justified by a tariff published or filed in consonance with the Interstate Commerce Act. A federal court does not gain or lose any jurisdiction simply because, prior to the advent of the action, a shipper may choose to or decline to pay a portion of the carrier's charges.

The Ninth Circuit's ultimate *ratio decedendi* in this case is that a shipper (customer) can create federal jurisdiction and a federal claim "arising under" the Interstate Commerce Act, simply by contesting the amount of the charges.

To attempt to define jurisdiction as abiding only in cases involving partial payment or contested charges is simply to misunderstand the nature and origin of the regulated carrier's rights and duties. As this Court noted last term in *Southern Pacific Transportation Co. v. Commercial Metals*, ___ U.S. ___, 102 S.Ct. 1815 (1982):

> "It is perhaps appropriate to note that a carrier has not only the right but also the *duty* to recover its proper charges for services performed. [Citation.] See *Pittsburgh, C.,C. & St.L.R. Co. v. Fink*, 250 U.S. 577, 581-583 (1919). This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act — to achieve uniformity in freight transportation charges, and thereby to eliminate the discrimination and favoritism that had plagued the railroad industry in the late nineteenth century. *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 361 (1943); *New York N.H. & H.R. Co. v. ICC*, 200 U.S. 361, 391 (1906)." 102 S.Ct. at 1820.

The scope of the misunderstanding on the part of the Ninth Circuit is best described in its own words:

> "Thurston Motors' claim relies on state contract law and has at most a collateral relationship to the Interstate Commerce Act." 682 F.2d at 812.

In view of the precedents of this Court and of the Courts of Appeals — including the Ninth Circuit before this case — the judgment below is simply wrong and in irreconcilable conflict with established precedent.

The common thread of the well-established precedents which the judgment below unsettles is that federal jurisdiction is available because the integrity of ICC tariffs and regulated-carriers' collection of charges based thereupon remain a matter of explicit, substantive federal law and federal *concern*.

Conclusion.

For the foregoing reasons, petitioner prays that the writ be issued so that the judgment below may be reversed. It is respectfully suggested that summary reversal is appropriate.

Respectfully submitted,

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